

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ERIE COUNTY ENVIRONMENTAL  
COALITION, PENNENVIRONMENT,  
INC. and THE GAIA DEFENSE LEAGUE,  
Plaintiffs

v.

MILLCREEK TOWNSHIP SEWER  
AUTHORITY AND MILLCREEK  
TOWNSHIP,  
Defendants

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)  
)  
) CIVIL ACTION NO. 05-59 ERIE  
) ELECTRONICALLY FILED  
)  
) JUDGE COHILL  
)  
)

**MOTION FOR LEAVE TO AMEND DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT AND TO FILE SUPPLEMENTARY MATERIALS TO  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS'  
RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Defendants MILLCREEK TOWNSHIP SEWER AUTHORITY and MILLCREEK TOWNSHIP, by and through their attorneys, MacDonald, Illig, Jones & Britton LLP, hereby file this Motion for Leave to Amend Defendants' Motion for Summary Judgment and to File Supplementary Materials to Defendants' Motion for Summary Judgment and Defendants' Response to Plaintiffs' Motion for Summary Judgment, and states the following in support thereof:

1. On March 31, 2006, Defendants Millcreek Township Sewer Authority ("MTSA") and Millcreek Township ("Millcreek") filed a Motion for Summary Judgment on the claims raised by Plaintiffs Erie County Environmental Coalition, PennEnvironment, Inc. and the Gaia

Defense League (collectively referred to as the "Plaintiffs") in this citizen suit action under Section 1365 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365. On that same date, Plaintiffs also filed a Motion for Summary Judgment.

2. On March 31, 2006, Defendants MTSA and Millcreek filed the following documents relevant to their Motion for Summary Judgment:

- (a) Concise Statement of Material Facts in Support of Defendant's Motion for Summary Judgment;
- (b) Appendix to Defendants' Motion for Summary Judgment;
- (c) Affidavit of George W. Riedesel; and
- (d) Brief in Support of Defendants' Motion for Summary Judgment.

3. On April 20, 2006, in response to Plaintiffs' Motion for Summary Judgment, MTSA and Millcreek filed the following:

- (a) Responsive Concise Statement of Defendants Millcreek Township Sewer Authority and Millcreek Township;
- (b) Appendix to Responsive Concise Statement of Defendants Millcreek Township Sewer Authority and Millcreek Township;
- (c) Brief in Opposition to Plaintiffs' Motion for Summary Judgment on All Claims; and
- (d) Supplemental Affidavit of George W. Riedesel.

4. On February 8, 2007, Defendants MTSA and Millcreek filed a Motion to Supplement Defendants' Motion for Summary Judgment and Defendants' Response to Plaintiffs' Motion for Summary Judgment (hereinafter "Defendants' Motion to Supplement") with the following attachments:

- (a) Supplement to Brief in Support of Defendants' Motion for Summary Judgment;
- (b) Supplemental Concise Statement of Material Facts in Support of Defendants' Motion for Summary Judgment; and
- (c) Second Supplemental Affidavit of George W. Riedesel.

5. On April 27, 2007, in response to Supplemental Plaintiffs' Reply to Defendants' Supplemental Brief in Opposition to Plaintiffs' Motion for Summary Judgment, Defendants filed the following:

- (a) Sur-Reply Brief in Response to Supplemental Plaintiffs' Reply to Defendants' Supplemental Brief in Opposition to Plaintiffs' Motion for Summary Judgment; and
- (b) Third Supplemental Affidavit of George W. Riedesel.

6. Defendants seek this Honorable Court's permission to amend their original Motion for Summary Judgment to add a new basis for summary judgment and to file supplementary materials to the above-listed documents to incorporate events that have occurred in the 13 months since the filing of Defendants' Motion to Supplement.

7. In their Complaint, Plaintiffs allege seven (7) discharges from the 51st and 52nd Streets and Zimmerly Road Pumping Station between August 2000 and September 9, 2004; Plaintiffs allege three (3) discharges from the Larchmont and Beaver Street Pumping Station between February 1, 2002 and September 9, 2004; and Plaintiffs allege three (3) discharges from the Church and Patton and Pershing Street Pumping Stations between April 14, 2002 and September 9, 2004. Contrary to Plaintiffs' Complaint, these were not pumping stations, but rather manhole locations where overflow occurred.

8. At the time Plaintiffs filed suit, MTSA and Millcreek already had entered into a 2003 Consent Order and Agreement ("2003 COA") with the Pennsylvania Department of

Environmental Protection, which required MTSA and Millcreek to take actions to stop the overflows at these manhole locations.

9. In the Motion for Summary Judgment filed on March 31, 2006, Defendants MTSA and Millcreek moved for summary judgment on the injunctive relief and civil penalties sought as a result of the alleged discharges at these manhole locations.

10. At the time MTSA and Millcreek filed Defendants' Motion to Supplement, although much of the work required by the 2003 COA had been completed, some of the work, including the work on the overflow retention tanks and accompanying improvements to the Kearsarge Pump Station, was still underway, but not completed.

11. Subsequent to the filing of Defendants' Motion for Summary Judgment, Defendants now have completed all of the work required to be completed under the 2003 COA, including construction of the overflow tanks at the Kearsarge Pump Station, removal of the Kearsarge Bypass and completion of the Inflow and Infiltration investigation.

12. Since the filing of Defendants' Motion to Supplement on February 8, 2007, there have been no discharges at any of the manhole locations identified in Plaintiffs' complaint: (1) 51st and 52nd Streets and Zimmerly Road; (2) Larchmont and Beaver Streets; and (3) Church and Patton and Pershing Streets. Thus, it has been 42 months (September 2004 - March 2008) since there has been an overflow at any of these locations.

13. In addition to the required work under the 2003 COA, since 2003, Millcreek and MTSA have connected 100 homes with failing on-lot septic systems in the Walnut Creek watershed to public sewer; committed \$3,754.00 in its 2008 budget to fund a proposed Walnut Creek Gage Station to measure stream flows on Walnut Creek; worked with the Department and the owners of the Millcreek Mall to develop a plan to address stormwater management for the

Millcreek Mall property; and agreed to sponsor/participate in a proposed streambank stabilization project on Walnut Creek. Further, through efforts that began in 2001, Millcreek purchased an approximately 22-acre parcel of property, having approximately 5,442 feet of frontage along Walnut Creek, for the purpose of creating a township park on the property.

14. MTSA and Millcreek seek leave to amend their Motion for Summary Judgment and to further supplement their Motion for Summary Judgment and their opposition to Plaintiffs' Motion for Summary Judgment to add these events as further support for the granting of Defendants' Motion and denying Plaintiffs' Motion.

15. Attached are the documents which Defendants respectfully request permission to file in the form substantially ready to file: Defendants' First Amended Motion for Summary Judgment (Exhibit A); Brief in Support of Defendants' First Amended Motion for Summary Judgment and Second Supplement to Brief in Support of Defendants' Motion for Summary Judgment and Brief in Opposition to Plaintiffs' Motion for Summary Judgment (Exhibit B); Second Supplement to Concise Statement of Material Facts in Support of Motion for Summary Judgment on Behalf of Millcreek Township Sewer Authority and Millcreek Township (Exhibit C); First Supplement to Responsive Concise Statement of Defendants Millcreek Township Sewer Authority and Millcreek Township (Exhibit D); Fourth Supplemental Affidavit of George W. Riedesel (Exhibit E) and Supplemental Affidavit of Brian P. McGrath (Exhibit F).

Wherefore, Defendants Millcreek Township Sewer Authority and Millcreek Township respectfully request that this Court grant Defendants' Motion for Leave to Amend Defendants' Motion for Summary Judgment and to File Supplementary Materials to Defendants' Motion for Summary Judgment and Defendants' Response to Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

s / Mark J. Shaw

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Millcreek Township Sewer Authority

and Millcreek Township

Dated: March 31, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on March 31, 2008, the foregoing Motion for Leave to Amend Defendants' Motion for Summary Judgment and to File Supplementary Materials to Defendants' Motion for Summary Judgment and Defendants' Response to Plaintiffs' Motion for Summary Judgment was filed electronically with the Clerk of Court using the Electronic Case Filing system. Notice of this filing will be sent to all parties by operation of the Court's ECF system and constitutes service of this filing under Rule 5(b)(2)(D) of the Federal Rules of Civil Procedure. Parties may access this filing through the Court's ECF system.

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s/Mark J. Shaw

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